FRANK TEO CHOON MONG

v.

WILH SCHULZ GMBH & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: 22-14-97-11]
18 FEBRUARY 1997

CIVIL PROCEDURE: *Injunction - Interim injunction - Setting aside - Applicable principles - Conflicting affidavits - Whether raising triable issues - Whether status quo to remain until trial of issues*

The plaintiff had entered into a Shareholders' Agreement ('the agreement') with the defendants and by that had formed a Joint Venture Company known as Forgetech Sdn Bhd ('the company'). Clause 25.1 of the agreement stipulates that the High Court of Singapore shall have jurisdiction over any disputes arising out of the application of the agreement. Subsequently, the plaintiff was appointed the Chief Executive Officer of the company for a term of five years with effect from 1 January 1996. On 20 January 1997, however, the plaintiff received a letter, issued purportedly by the company, terminating his appointment. The plaintiff alleged that the letter of termination, not being issued in accordance with the agreement, was invalid, null and void. The plaintiff then applied for, and obtained an interim injunction for an order to restrain the defendants from interfering with his performing his function and duty at the company. The defendants thereupon filed an application to set aside the injunction, citing as grounds thereof (i) non-disclosure of material facts (ii) the court's lack of jurisdiction to hear the plaintiff's application for an injunction, and (iii) absence of reasonable cause of action.

Held:

[1] Clause 25.1 did not have the effect to oust the jurisdiction of that court or any other High Court. Therefore the High Court had the jurisdiction to hear the application as the factory was sited there, and the cause of action arose within jurisdiction.

[2] The letter of termination did not disclose the reasons for the termination nor the authority of the person who signed on behalf of the company. It appeared to be a wrong exercise of power, it was *ultra vires* the Shareholders Agreement and in breach of the plaintiff's contract of employment.

[2a] It was also clear that upon his appointment, the plaintiff was responsible wholly for the running and management of the company. There was no expressed provision for the termination of the employment in the duration of the five year term, and the appointment should therefore only expire on 30 December 2000.

[3] The termination of the plaintiff was subject to the terms of the contract of employment. There was no expressed provision for the termination thereof, and in the event, it raised a serious question to be tried.

[4] This was a case of an interlocutory injunction whereby the plaintiff needed to be protected until the trial of the case. The injunction was necessary and of the utmost importance to preserve the *status quo* until the question was tried and settled.

[5] It was also clear that the area where the defendant had alleged that the plaintiff had misled the court was also area of dispute. The conflicting affidavits clearly indicated that it would be impossible to come to any finding on those disputed issues without the proper trial.

[Application dismissed. Interim injunction to remain.]

Cases referred to:
Daglish v. Javier [1851] 20 LJ Ch 475 ***(refd)***
Fellows v. Fisher [1975] 3 WLR 185 ***(refd)***
Hubbard v. Pitt [1975] All ER 10 CA ***(refd)***
Mohamed Zainudin bin Puteh v. Yap Chee Seng [1978] 1 MLJ 41 ***(refd)***
Schmitten v. Faules [1893] WN 64 ***(refd)***

For the plaintiff - William Chang Kok Lian & Shanker RP Asnani; M/s Yong & Co Advoc
For the defendants - Stanley Eddy; M/s Battenberg & Talma Advoc

Reported by Rusnah Abd Aziz

JUDGMENT

Muhammad Kamil Awang J:

The plaintif together with the 1st defendant and the 2nd defendant entered into a Shareholders' Agreement dated 24 January 1996, and formed a joint venture company known as Forgetech Sdn. Bhd., (formerly known as IFF Manufacturing Sdn. Bhd.) (the company) for the setting up of a factory at Lot 1023 Demak Laut Industrial Park, Kuching. The company was registered in Malaysia, and its equity holdings of the plaintiff, the 1st defendant and the 2nd defendant are 20%, 40% and 40% respectively.

The plaintif was appointed the Chief Executive Officer cum Managing Director of the company with effect from 1 January 1996, for a term of five years pursuant to the Shareholders Agreement. Out of the blue, on 20 January 1997 the plaintiff received a letter of termination of his appoinment (exh. FTCM5) purportedly issued by the company for reasons unknown. The plaintiff avers that the letter of termination was invalid, null and void because it was not issued in accordance with the provision of the Shareholders Agreement. As a result, of the alleged termination, the defendants apparently had directed their agents, *viz* the production supervisors Mr. Manfred Albert and Mr. Michael Deres, who took possession of the factory at Kuching, and refused entry into the factory to the staff or anyone, including the plaintiff.

The plaintiff applied and obtained an Interim Injunction from the High Court Kuching on 25 January 1997 for an order to restrain the defendants whether by themselves, their servants or agents or otherwise howsoever from the following acts, or any of them, that is to say, from interfering with the plaintiff in performing of his function and duty as the Managing Director cum Chief Executive Officer of the said company or from interfering with and/or disrupting the plaintiff in the day to day running of the affairs and operation of the said company and damages to be assessed.

Now the defendants made an application to set aside the Interim Injunction on the following grounds:

a) for non-disclosure of material facts;

b) the Interim Injunction would exclude the powers of the Directors and Board of Directors;

c) it discloses no reasonable cause of action;

d) it is scandalous, frivolous or vexatious;

e) it is otherwise an abuse of the process of the court.

Further, the defendants contend that this court has no jurisdiction to hear the application for an injunction by reason of cl. 25.1 of the Shareholders Agreement, which provides:

> The High Court of Singapore shall have the jurisdiction to settle any dispute or differences regarding the interpretation or application of this Agreement or the rights and duties and liabilities of either party that may at any time arise between the parties hereto touching on the construction of this Agreement or as to the rights and liabilities of the Parties hereunder.

With respect this cl. 25.1 does not have the effect to oust the jurisdiction of this court or any other High Court. Therefore the High court has the jurisdiction to hear the application as the factory is sited here, and the cause of action arose within jurisdiction.

This letter of termination purportedly issued by Forgetech Sdn. Bhd. does not disclose the reasons for the termination not the authority of the person who signed on behalf or for the company. It appears to be a wrong exercise of power, and *ultra vires* the Shareholders Agreement (FTCM3) and in breach of the plaintiff's contract of employment (FTCM19). Both these documents contain no provision for the termination of the appointment of Chief Executive Officer and Managing Director of the company.

The plaintiff was appointed under The Employment Agreement dated 15 December 1995 between IFF Manufacturing and Frank Teo Choon Mong (FTCM 19).

Paragraph 2 – Job Titles and Responsibilities, stipulates;

> 2. The Appointee shall be appointed as the Chief Executive Officer/Managing Director of the company and shall be based in Singapore.
>
> He will be responsible for the setting up the manufacturing operation and its supporting organisation. He will have overall management and control of the company and assume a strategic role in driving and providing impetus to ensure business growth and profitability.
>
> Key responsibilities including formulating and implementing new business stategies, identifying and securing new business opportunities, establishing the necessary infrastructure to support the company's operations and activities.
>
> And,
>
> The commencement date of the employment of the Appointee shall be from 1 January 1996 for a period of five (5) years from the date of commencement. (see para. 1)

It is clear that upon appointment, the plaintiff was responsible wholly for the running and management of the company including the Kuching factory. There is no express provision for the termination of the employment in the duration of 5 years term, that is to say, under these agreements the expiry period of the 5 years ends on 30 December 2000.

On 20 January 1997 a letter was sent by Forgetech Sdn. Bhd. to the plaintiff terminating his services in the company with immediate effect. The said letter "FTCM5" is reproduced as follows:

FORGETECH SDN. BHD.
FORMERLY KNOWN AS IFF MANUFACTURING SDN. BHD.

Menara Aetna Universal Box # 10-01, 84 Jalan Raja Chulan 50200 Kuala Lumpur, Malaysia. Tel: 603-2625470/2625472 Fax: 603-2625476

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20 January 1997

Frank Teo Choon Mong
84 Pasir Ris Terrace
Singapore 518727

Dear Sir

LETTER OF TERMINATION

We hereby give you three (3) month's notice of termination of your contract of employment with the Company.

We will pay you three (3) month's salary in lieu of notice. Today will be your last day.

You are to return immediately all keys, credit cards and other items of whatsoever nature or description of the company which is in your possession.

Kindly also clear all your personal belongings by the end of the working day.

Yours faithfully,

(SGD: WOLFGANG SCHULZ)

SINGAPORE 133 New Bridge Road # 22.03/04/05 Chinatown Points Singapore 059413 Tel: 65-2245533 Fax: 65-2241010
KUCHING (Factory) Lot 1023 Demak Laut Industrial Park (Sejingkat) Kuching Sarawak, East Malaysia.

The Memorandum and Articles of Association of I.F.F. Manufacturing Sdn. Bhd. (JVM5) provides for the post of Managing Director,:

> 91. The directors may from time to time appoint one or more of their body to the office of managing director for such period and on such terms as they think fit and, subject to the terms of agreement entered into in any particular case, may revoke any such appointment. A director so appointed shall not, while holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors, but his appointment shall be automatically determined if he ceases from any cause to be a director.

Art. 20.1 of the Shareholders Agreement dated 24 January 1997 (FTCM3), provides:

> In the event of any conflict or inconsistency between the provisions of this Agreement and the Memorandum and Articles of Association of the JV Company, the provisions of this Agreement shall prevail.

It is clear that the termination of the Chief Executive Officer cum Managing Director is subject to the terms of contract of employment (FTCM19). There is no express provision for the termination thereof. This raises a serious question to be tried.

This is a case of an interlocutory or interim injunction whereby the plaintiff needs to be protected until the trial of the case. Pursuance to the terms of the employment, he is solely responsible to look after and carry on with the function of the company, in particular, the Kuching factory. The plaintiff is responsible to set up the factory and its operation. His duty is to see that the factory be completed and the production to commence sooner, and therefore he needs to be protected from interference or stoppage in carrying his duties. I will not be exercising my discretion correctly if I were to disallow this and set aside the injunction. To my mind the injunction is necessary and of the utmost importance to preserve the *status quo* until the question is tried and settled.

The sole and main ground of this application is based on the defendants' affidavits, that the plaintiff had not stated the facts fully and accurately and the plaintiff had not disclosed all material facts. In *Mohamed Zainudin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 41, Hashim Yeop A Sani J (as he then was) held that: "It is an established law that the court in an application of this nature must be satisfied that the person who asked for the interlocutory injunction did not mean to deceive the court and that the court is bound to maintain the principle that those who come "asking *ex parte* for injunctions must proceed with the highest good faith, and keep back no material facts" *see Schmitten v. Faules* [1893] WN 64. This standard had been maintained strictly and it was held that when a party comes for an injunction there is no obligation upon him to ascertain what are the important facts of the case and it is no excuse to say that the party does not consider the facts to be important. The party applying for an *ex parte* injunction is bound to state not only the facts that he considers material but all facts within his knowledge that are material and therefore if it is shown that a plaintiff had innocently omitted to state circumstances which turn out to have material bearing upon his rights the injunction should be dissolved – see *Daglish v. Javier* [1851] 20 LJ Ch. 475." I think it is pertinent in this case to examine first of all the areas where

it is alleged that the plaintiff had either misled the court or had omitted material facts. Judging from the affidavits filed the areas seem to be as follows:

(1) that the plaintiff was appointed the Chief Executive Officer cum Managing Director of the company for five years, *vide* the contract of employment (FTCM19), and that he never disclosed that he was in breach or in default of the contract;

(2) that he never disclosed to the court that the court had no jurisdiction to grant injunction in view of para. 25.1 thereof;

(3) that he never disclosed that the defendants or their agents or servant had the right to interfere in the plaintiff's service or day to day operation.

However on closer analysis it would also seem clear to me that the areas where the defendant has alleged that the plaintiff has misled the court are also areas of dispute. The conflicting affidavits clearly indicate that it would be impossible to come to any definite finding on those disputed issue without the proper trial.

In *Fellows v. Fisher* [1975] 3 WLR 185, Lord Denning discussed the *American Cynamid* case and said that we are no longer to ask whether the plaintiff has made a *prima facie* case and that all we need to ask now is the question whether there is a serious question to be tried. If there is, then we should take measures to preserve the *status quo* until the trial. In *Hubbard v. Pitt* [1975] All ER 10 CA Lord Denning again said of the principles involved that the first question to be asked is simply whether there was a serious question to be tried in the sense that the claim is not frivolous or vexatious. Secondly, if the defendants were to succeed at the trial, whether they were adequately compensated for the interim continuance of the plaintiff's activities. Conversely is the question that if the plaintiff were to succeed at the trial, whether he would be adequately compensated for the interim restriction on the activities which the grant of an interlocutory injunction would be imposed. The judge then considers the balance of convenience, and if the relevant factors are evenly balanced the court should grant an interlocutory injunction which would maintain the *status quo*. It is said that at that stage the court is not justified in embarking from anything resembling a trial of the action upon conflicting affidavits.

Applying the above principles to the matters as disclosed in the affidavits in this case it is my view that the application should be dismissed and the interlocutory injunction to remain. Accordingly the application is dismissed with costs to the plaintiff, and an early trial is ordered.